NOTE: Portions of this supplemental brief have been stricken pursuant to the Deputy Clerk's March 24, 2010, ruling granting the Respondent's motion to strike.

NO. 83343-5

IN THE SUPREME COURT

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

HELEN D. IMMELT,

Appellant.

SUPPLEMENTAL BRIEF OF APPELLANT

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II. STATEMENT OF THE CASE

Helen Immelt was arrested, handcuffed, and taken to jail by Snohomish County Deputy Sheriff Sergeant David Casey for alleged violations of a harassment statute which had been declared unconstitutional.[1] The day of trial, over objections, the charge was

[1] CP 417:9-10; 418:1-4. The initial charge was threatening the mental health of neighbors by blowing a car horn under RCW 9A.46.020 (1)(a)(iv). The "mental health" part of the statute was declared unconstitutionally void for vagueness in *State v. Williams*, 144 Wash.2d 197, 26 P.3d 890 (2001).

amended to a misdemeanor noise violation of SCC § 1010.01.040.[2]

The facts recited by the Court of Appeals[3] can be summarized as follows: As a result of a complaint, Helen Immelt received a letter from the homeowners' association ordering her to stop raising chickens in her backyard. In the afternoon of May 12, 2006, Helen Immelt yelled and cursed at a neighbor in a dispute over the complaint and letter. That same afternoon, Immelt confronted the homeowners' association's president. The ensuing shouting match attracted three neighbors including the one who admitted filing the complaint (John Vorderbrueggen). The next morning, Immelt parked her car in front in front of Voderbruggen's house and honked her horn from 5:50 am to 6:00 am. Voderbruggen called 911. Sergeant Casey arrived around 7:00 am and asked Immelt to stop honking her horn or face arrest.[4] A few minutes later, Immelt drove her car from her driveway and Sergeant Casey heard three long horn blasts.

Casey testified Immelt told him she honked after a neighbor made an obscene gesture at her as she drove past him on a public street. The neighbor claimed he waved his hand and blew a kiss. (CP 352:15-355:2;

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[2] The Ordinance is made a misdemeanor pursuant to SCC 10.01.080 (3). CP 13; 110:19-111:7.

[3] Immelt disputes the facts outlined by the Court of Appeals.

[4] There is absolutely nothing in the record to support the Court of Appeals "finding" or conclusion that Casey warned Immelt not to honk her horn anymore. RP 405:18-21 of the Clerk's Papers.

414:25-415:7) The neighbor was a construction worker[5] and his "kiss" was likely in the form of *le troisième doigt*.[6]

Immelt defended herself *pro se* in a three day jury trial and was convicted. She was sentenced to ten days in jail plus a fine.[7] Immelt had proposed a "to convict" jury instruction which would have permitted her to argue her First Amendment defense and objected to the State's instructions for failing to address that issue.[8]

III. ARGUMENT

No longer is the inquiry into the protected status of speech one of law, not fact.[9] Now it is a mixed question of law and fact. The fact portion is to be decided by the trier of fact.[10]

In general, an ordinance is presumed to be constitutional, and the party challenging its constitutionality bears the burden of proving its

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[5] CP 347:18-348:1; 356:2-22.

[6] Deputy Casey testified that Immelt told him that she honked in response to Menalia's obscene gesture. (CP 352:15-355:2; 414:25-415:7). However, the Court of Appeals stated that the record did not support that the second honking was in response to the neighbor's obscene gesture (at 688 and 1260). Whether it was a kiss or obscene gesture and whether it precipitated or followed the horn honk, it is readily apparent that both parties communicated to each other. One is saying "get lost" and the other, "same to you, buddy".

[7] CP 16.

[8] Trial transcript at 434:6-436:24; Court of Appeals Motion for Discretionary Review at pp. 8-9. The text of Defendant's proposed instruction is found at Exhibit A in the Appendix pursuant to RAP 10.4 (c).

[9] See *Connick v. Myers*, 461 U.S. 138, 148 n.7 (1983).

[10] *Garcetti v. Ceballos*, 547 U.S. 410 (2006); *Posey v. Lake Pend Orielle School Dist. No. 84*, 546 F.3d 1121 (9th Cir. 2008).

unconstitutionality beyond a reasonable doubt.[11] In the First Amendment context, the burden shifts and the State usually "bears the burden of justifying a restriction on speech"[12]

[11] *State v. Hughes*, 154 Wash.2d 118, 132, ¶ 25, 110 P.3d 192 (2005) (quoting *State v. Thorne*, 129 Wash.2d 736, 769-70, 921 P.2d 514 (1996)), overruled in part on other grounds by *Washington v. Recuenco*, 548 U.S. 212, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006). The same rules of statutory construction apply to statutes and ordinances. *City of Puyallup v. Pacific NW Bell Tel. Co.*, 98 Wash.2d 443, 448, 656 P.2d 1035 (1982).

[12] *Ino Ino, Inc. v. City of Bellevue*, 132 Wash.2d 103, 114, 937 P.2d 154, 943 P.2d 1358 (1997). See *Voters Educ. Committee v. Washington State Public Disclosure Com'n*, 161 Wash.2d 470, 481 166 P.3d 1174, 1180 (2007).

Everyone knows honking is speech.[23] Whether the horn is used to warn another driver, express frustration, or make a statement, it is used solely for communication.

1. **Regardless of whether or not a trier of fact can discern a "particularized message", honking is speech.**

[23] The only exceptions are accidental horn blowing. A car's security system is commonly designed to blow the horn as an alarm. Even this type of horn blowing communicates a message.

* Note pg. 6 of This brief has been stricken

Appellate courts defer to trial courts because they are able to evaluate the tone and body language of witnesses.

The courts have erred with the "words" versus "conduct" distinction.[26] As predicted by Justices Black, Douglass[27], and now Scalia, attempts by Courts to limit speech rights have led to a mass of confusing and conflicting distinctions that make no logical sense. Taken to its logical conclusion, only speech without its non-verbal element (think talk-radio) is protected *per se* by constitutions. Non-verbal expressions (think mimes) are only protected if a trier thinks there is "particularized speech". The constitutional privilege of free speech is taken from the speaker and is given to the listener. If the listener does not think the speech is particularized, the speaker is deprived of his constitutional right to speak.[28]

Another difficulty with cases on particularized speech is that courts are attempting to determine the intent of the defendant. Since the

[redacted]

[26] This brief assumes the "particularized message" and "conduct" standard are the same. The courts meant to say that it must be determined whether a particularized message was communicated by the speaker's conduct.

[27] *Miller v. California*, 413 U.S. 15 (1973), Douglass dissenting. *New York Times v. United States*, 403 U.S. 713 (1971), Black and Douglass concurring.

[28] The "particularized message" and "sufficiently imbued with elements of communication" tests were reemphasized in *Texas v. Johnson*, 491 U.S. 397, 109 S.Ct. 2533 (1989), a five-four decision that provides little guidance. It leaves courts with a subjective "know it when I see it" legal standard. If the court feels that enough people understand the message, the court may find that the conduct is "speech." Some cases have added the word "context" to the analysis but that does not help. Those courts subjectively determine whether speech occurred from the context.

defendant usually does not testify, courts (like Division One in this case) can state that there is no evidence in the record that the defendant was attempting to convey a message. Therefore the defendant has a choice, waive his or her constitutional right against self incrimination, or waive his or her constitutional right to free speech. This cannot be what the framers of the constitution intended.[29]

The speech conduct distinction should be abandoned in favor of recognizing body language as speech. Automobile horn honking is a form of body language often accompanied by angry speech.

2. Snohomish County Ordinance implicitly recognizes horn honking as speech by allowing "public safety" horn honking.

Snohomish County's Ordinance punishes horn honking unless it is "public safety" horn honking. If a horn is honked for "private safety" or any other non-public safety reason, it is a violation of the ordinance.

[29] In this case, Deputy Casey himself testified that the defendant told him her honking was in response to Menalia's obscene gesture (CP 352:15-355:2; 414:25-415:7).

Snohomish County does not inform its citizens how to distinguish horn honking that has a public safety motive from that which does not. Implicitly, Snohomish County is admitting horn honking is speech – some of it is public safety speaking and some is not.[30]

There are two ways to determine whether horn honking speech is about "public safety" or something else: 1) examine the subjective motive of the horn honker or 2) analyze the honking objectively – would a reasonable person understand the honking is related to public safety?[31] If the Ordinance is creating a subjective standard it is void for vagueness.[32] Under the objective approach, Snohomish County is admitting that a reasonable person can understand the "particularized message" of the horn honker. That would be the only means for a reasonable person to distinguish between honking that is for public safety and that which is not.[33] If a reasonable person can understand the meaning of honking, then a "honk is not just a honk", it is speech.[34]

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[30] See, *Goedert v. City of Fernadale*, 596 F.Supp.2d 1027 (E.D. Mich. 2008), 2008 WL 928315 (E.D. Mich.) [unpublished].

[31] Washington favors the objective analysis. See *State v. Johnston*, 156 Wash.2d 355, 360, 127 P.3d 707, 710 (2006).

[32] "This court has invalidated criminal laws for vagueness when they are overly subjective." *State v. Williams*, 144 Wash.2d 197, 26 P.3d 890, 895 (2001) citing *City of Bellevue v. Lorang*, 140 Wash.2d 19, 31, 992 P.2d 496 (2000).

[33] Both the objective and subjective analysis requires analysis of the facts and circumstances of the honking and an appropriate jury instruction given.

[34] This point was made by *Goedert* at 1032: "If a honk is incapable of conveying speech, then Ferndale would not be able to discern which honks are unlawful under their "Honk Statute," making the ordinance impossible to apply to motorists".

B. IMMELT WAS COMMUNICATING A MESSAGE.

Both the Division One decision and Snohomish County's brief in that case admit that Immelt was communicating an angry message. Because Immelt exercised her constitutional right to not incriminate herself, the testimony of Deputy Casey conveyed Immelt's intent. It is obvious from the testimony of all the witnesses and the circumstances she was protesting (demonstrating) what she believed was an unfair targeting of her chickens by some of her neighbors and the homeowner's association. She was also responding to Menalia.

Washington's Constitution protects speech "on all subjects".

C. HONKING CAN BE SPEECH.

Since Snohomish County admits that horn honking can carry a message of "public safety", honking is speech in some circumstances. This means horn honking by implication can carry other messages. It can carry a message of support or opposition at public political demonstrations. Honking frequently carries a message of personal anger or frustration at another motorist.

D. THE SNOHOMISH COUNTY ORDINANCE IS A PRIOR RESTRAINT OF AT LEAST SOME PERMITTED SPEECH.

Although there may be disagreement on a particular example,

everyone should agree that at least some non-public safety communication through automobile horn honking is protected speech. The ordinance is therefore a prior restraint on some protected speech.

The standard of review shifts and places the burden on the State. "[A] any restraint imposed upon a constitutionally protected medium of expression comes into court bearing a heavy presumption against its constitutionality".[35]

E. WASHINGTON'S CONSTITUTION PROHIBITS PRIOR RESTRAINT ON SPEECH.

Whenever a party invokes the protection of the Washington Constitution, the Court must determine if the asserted right is more broadly protected under the state constitution than it is under federal constitutional law. If it is, the court must apply Washington constitutional law.[36]

The Washington Supreme Court appears to have decided that prior restraint is prohibited by the Washington Constitution:

> We are entirely clear that the court had no jurisdiction to make the order which forms the basis of this proceeding, for such order was an attempted infringement upon rights guaranteed to every citizen by section 9, article I, of the constitution of this state. That section

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[35] *Fine Arts Guild, Inc. v. City of Seattle*, 74 Wash.2d 503, 445 P.2d 602 (1968) citing *Freedman v. State of Maryland*, 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 83 S.Ct. 631, 9 L.Ed.2d 584 (1963); *Adams v. Hinkle*, 51 Wash.2d 763, 322 P.2d 844 (1958).

[36] *City of Spokane v. Douglass*, 115 Wash.2d 171, 176, 795 P.2d 693, 695 (1990) citing *Forbes v. Seattle*, 113 Wash.2d 929, 934, 785 P.2d 431 (1990).

provides: "Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press." The wording of this section is terse and vigorous, and its meaning so plain that construction is not needed.... It is patent that this right to speak, write, and publish, cannot be abused until it is exercised, and before it is exercised there can be no responsibility. **The purpose of this provision of the constitution was the abolishment of censorship, and for courts to act as censors is directly violative of that purpose.**[37]

F. HORN HONKING DOES NOT FALL WITHIN ONE OF THE EXCEPTIONS TO PRIOR RESTRAINTS ON SPEECH.

Not all prior restraints on speech are prohibited. Federal law has long recognized the validity of some prior restraints on constitutionally unprotected speech, such as obscenity and incitement to acts of violence, and on speech that directly threatens military security.[38] Other exceptions include defamation, and fighting words.[39] Public safety and police power are other possible exceptions.[40] In addition, a regulation may not rise to the level of a prior restraint if it is merely a valid time, place, or manner

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[37] *State v. Coe*, 101 Wash.2d 364, 376, 679 P.2d 353, 361 (1984) emphasis added.In *Voters Educ. Committee v. Washington State Public Disclosure Com'n*, 161 Wash.2d 470, 166 P.3d 1174 (2007) the majority found that the requirement that a political action committee register or face a penalty is not a prior restraint since Section 9, Article I anticipates that penalties be imposed.

[38] See *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 716, 51 S.Ct. 625, 631, 75 L.Ed. 1357 (1931). See also *Seattle v. Bittner*, supra, 81 Wash.2d at 757, 505 P.2d 126 (some prior restraints on obscenity valid). Washington seems to have adopted federal law on exemptions to prior restraint. See *Coe* at 372 and 359 P.2d.

[39] *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 383 112 S.Ct. 2538, 2543 (U.S. Minn., 1992). *Rickert v. State, Public Disclosure Com'n*, 161 Wash.2d 843, 849, 168 P.3d 826, 828 (2007) accepts the validity of the defamation exception without discussing the Washington Constitution which arguable allows defamation subject to later penalty. If that is true, exceptions from prior restraint are suspect under Washington law.

[40] See *City of Bellevue v. Lorang*, 140 Wash.2d 19, 992 P.2d 496 (2000).

restriction on the exercise of protected speech.[41]

Horn honking does not fit into any of the categories of constitutional proscribable low-value speech.

G. THE SNOHOMISH COUNTY ORDINANCE IS OVERBROAD UNDER FIRST AMENDMENT DUE PROCESS ANALYSIS.

Washington's Constitutional law has not developed an analysis of the heightened due process overbreadth standard separate from federal constitutional law.

> A statute is overbroad if its prohibitions extend beyond proper bounds and violate the First Amendment's protection of free speech. An overbreadth challenge is facial, and will prevail even if the statute could constitutionally be applied to a litigant.
>
> In *Huff*, this court outlined the rule to be applied in overbreadth challenges:
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> A law is overbroad if it sweeps within its prohibitions constitutionally protected free speech activities. The First Amendment overbreadth doctrine may invalidate a law on its face only if the law is "substantially overbroad". In determining overbreadth, "a court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct." Criminal statutes require particular scrutiny and may be facially invalid if they "make unlawful a substantial amount of constitutionally protected conduct...." This standard is very high and speech will be protected "... unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest."[42]
>
> Snohomish County's noise ordinance is facially invalid by making

[41] *Cole* at 372 and 359 P.2d.
[42] *Lorang* at 26 and 500. Citations omitted.

horn honking unlawful at demonstrations, political rallies, and for private safety purposes. Most horn honking does not rise far above public inconvenience, annoyance, or unrest.

H. THE SNOHOMISH COUNTY ORDINANCE IS VOID FOR VAGUENESS UNDER FIRST AMENDMENT DUE PROCESS ANALYSIS.

Washington's Constitutional law has not developed an analysis of the heightened due process vagueness standard separate from federal constitutional law.

Snohomish County's ordinance has no definition of "public safety". The ordinance does not limit "public safety" to traffic laws. Most would agree that public safety certainly includes fire fighting and commission of felonies. It can be divided into serious and less serious violations of public safety. Washington law states less serious violations of public safety includes false verification for welfare, unlawful issuance of checks, unlicensed practice of a profession or business, and computer trespass.[43]

Since the Snohomish County ordinance has no time or place restrictions, is it lawful to honk a horn at midnight in front of a person's home who unlawfully issued a check? Is it lawful to honk at speeding

[43] *Harris v. Charles*, 151 Wash.App. 929, 939, 214 P.3d 962, 967 (Div. 1, 2009). The Court also held that some misdemeanors have more impact on public safety than some felonies.

motorist? Is it lawful to honk at those who have been convicted of a felony? Is it lawful to honk in front of the home of a convicted sex offender if there is a reasonable expectancy he will reoffend?

I. THE SNOHOMISH COUNTY ORDINANCE IS TOO VAGUE UNDER DUE PROCESS ANALYSIS.

Washington's Constitutional law has not developed an analysis of this issue separate from federal constitutional law.

> Under the due process clause of the Fourteenth Amendment, a statute is void for vagueness if either: (1) the statute "does not define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is proscribed"; or (2) the statute "does not provide ascertainable standards of guilt to protect against arbitrary enforcement".[44]

In addition to the issues raised in the previous section, the ordinance allows honking for public safety not private safety. If a person believes someone is trying to throw a rock at his car, can he honk his horn? If a person makes a threatening gesture, can he honk his horn?

J. DIVISION ONE ERRED BY FAILING TO COMPLETE THE ANALYSIS OF THIS CASE UNDER RELEVANT CONSTITUTIONAL LAW.

The glaring error by Division One is its failure to recognize that honking could be speech in some circumstances and apply the relevant constitutional analysis.

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[44] *Lorang* at 30 and 502.

The Court of Appeals started by failing to recognize the correct standard of review. It stated Immelt must prove the unconstitutionality of the statute beyond a reasonable doubt. It did not recognize "[i]n the First Amendment context, the burden shifts and the State usually 'bears the burden of justifying a restriction on speech".[45]

The Court of Appeals then assumed without analysis that honking is not speech *per se*. It analyzed honking as conduct that could be speech if there were a particularized message. The Court of Appeals stated horn honking "done to annoy or harass others is not speech".[46] It determined that Immelt honked the horn because she was "unhappy" with the complainer to the homeowner's association about her chickens and therefore the only purpose for the honking was "harassment".[47] Implicitly the Court found that unhappy and harassing speech is not speech.

The Court of Appeals then failed to complete the constitutional analysis of the free speech issues. It recognized that honking could be speech but held that it was not particularized speech in Immelt's case. Since it could be speech, the Court needed to determine whether it was a

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[45] *Voters Educ. Committee at* 481 and 1180.
[46] *Immelt* at 687 and 1260 citing *State v. Compas*, 290 Mont. 11, 964 P.2d 703, 706 (1998) (conviction for disorderly conduct upheld where defendant sounded loud continuous blasts when passing a recreational vehicle park and campground that she considered an eyesore). The Court ignored the "public inconvenience, annoyance, or unrest" speech described in *Lorang* at 26 and 500.
[47] Id.

prior restraint and complete the remainder of the constitutional analysis. Since horn honking could be speech, the Court should have determined whether the ordinance was a prior restraint on speech. Then the Court should have considered whether Washington's Constitution permits a prior restraint of speech. If it does, is horn honking one of the permitted exceptions to constitutionally protected speech? If the ordinance survived that analysis, the Court of Appeals was required to perform the First Amendment overbreadth and vagueness analysis.

Instead the Court of Appeals only considered the due process vagueness issue. Without any analysis of the meaning of the words, the Court of Appeals stated that persons of ordinary intelligence can comprehend the term "public safety".[48]

One case relied on by the Court of Appeals is *Meaney v. Dever*.[49] The court in *Meaney* began by assuming without analysis that honking a horn should be considered "conduct" not speech. It then stated the factual conclusion that "[b]lasting an air horn is qualitatively different from a more readily understood expressive conduct of inherent First Amendment significance, such a picketing, boycotting, canvassing, and distributing

[48] *Immelt* at 689 and 1261.
[49] 326 F.3d 283 (2003). *Meaney* is cited by the Court of Appeals but no analysis of the decision is performed. The Court merely cited some broad language from the case.

pamphlets".[50] Inexplicably, the court lists conduct (boycotting), mixed conduct and speech (picketing with signs and distributing pamphlets), and pure speech (canvassing) as examples of conduct-as-speech. *Meaney* then concludes that even though the horn blowing "arguably" communicated anger with the mayor, that was not a "message" because the court did not think there was a "great likelihood" that those who attended the mayor's inauguration understood that Meaney was angry.[51] The *Meaney* court based the constitutional privilege not on the speaker's intent but the listener's comprehension. Since the court did not think the audience, none of whom testified in the case, could understand the message, the speaker had no constitutional rights.

Division One cited *Meaney* even though that the case was decided on other grounds not related to the analysis accepted by Division One. The *Meaney* court decided the case based on the limited free speech rights of public employees. The language cited by Division One is pure dictum.[52]

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[50] Id at 287.
[51] Id.
[52] It is troubling that factual conclusions without any stated reasoning are quoted by other courts if a Latin phrase is added. Division I quotes *Meaney* "[Horn blowing] is not an expressive act *a* fortiori" (at 688 and 1260). It is difficult to understand what is meant by the Latin in this context. *Argumentum a fortiori* is used to state that the point made is implicit in a previous point.

IV. CONCLUSION

The federal and state constitutions were not written to protect courteous and refined table conversation. The constitutions were designed to protect speech that some people did not want to hear. The constitutions created a privilege for the *speaker* regardless of the reaction of the hearer.

[53] See fn 9, *supra.*
[54] Id.
[55] Failure to include every element of the crime charged amounts to constitutional error that may be raised for the first time on appeal. *State v. Fisher*, 165 Wash.2d 727, 753, 202 P.3d 937, 950 (2009). Alleged errors in jury instructions are reviewed *de novo*. *State v. Boss*, --- P.3d ----, 2009 WL 4844372 (,2009).

Snohomish County could prohibit horn honking using reasonable time, place, and manner restrictions. There is no reason to uphold this ordinance.

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V. APPENDIX A

Exhibit A

DEFENDANT'S 1

INSTRUCTION NO. ____

To convict the defendant of the crime of Public Disturbance, each of the following elements of the crime must be proven by the State beyond a reasonable doubt:

1. That on May 13th, 2006, the defendant intentionally blew her car horn for other than a public safety purpose in front of the Vorderbrueggen home and that the defendant, later, intentionally blew her car horn at Mike Menalia for other than a public safety purpose.
2. That there was no defect in the horn.
3. That the defendant had no first amendment protection for blowing her horn.
4. That the acts occurred in Snohomish County, Washington.

The defendant has no obligation to prove or disprove any of the above elements. The burden of proof always lies with the State and never shifts to the Defendant.

If you find from the evidence that each of these elements has been proven beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.